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order was entered by Mr. Justice Clark extending the time for filing a petition for a writ of certiorari to and including December 12, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in an action to condemn "any" interest remaining in a lessee of Government property, the Government is estopped to assert that the lessee has no interest in the property because the lease was revoked.

2. Whether a lease of a Navy airfield which provided that it could be revoked upon a determination that "such revocation is essential" and which was entered into under a statute requiring that such leases be revocable "at any time," could be revoked upon a determination that the property was needed for an Army missile site.

STATUTES INVOLVED

The Act of August 29, 1916, 39 Stat. 556, 559, 34 U. S. C. (1946 ed.) 522, provided in part:

> LEASE OF NAVAL LANDS: That authority be, and is hereby, given to the Secretary of the Navy, when in his discretion it will be for the public good, to lease for periods not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time being be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress: * * *.

The Act of August 5, 1947, § 1, 61 Stat. 774, 34 U. S. C. 522a, provides in part:

> That whenever the Secretary of War or the Secretary of the Navy shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary of the Department concerned may include, among other terms and conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law. Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary of the Department concerned dur-

ing a national emergency declared by the President. * * *

STATEMENT

On October 6, 1954, the Government filed a complaint in the United States District Court for the Northern District of Illinois seeking to acquire by condemnation any outstanding interests in the United States Naval Outlying Airfield, located near Chicago (R. 9–12). Respondent, which was operating the property as an airport, claimed that it held the property under a lease from the Government and that it was entitled to compensation for the taking of its leasehold interest. The Government claimed that the lease had been revoked and denied that respondent had any interest in the property. Both the district court and the court of appeals upheld respondent's claim. The relevant facts are as follows:

On May 2, 1947, the United States and respondent executed a lease of the airfield providing in part as follows (R. 12–23):

* * * * *

> Whereas, because of its strategic value, it is considered essential that the said airfield and the facilities thereon, comprising the said United States Naval Outlying Airfield, be retained in a stand-by status for post-war use in connection with Naval Aviation activities; and
>
> * * * * *
>
> Whereas, the use of the airfield and facilities by the Lessee for such purposes will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary

deemed to be in the best interest of the Government.

Now Therefore, in consideration of the foregoing, and of the covenants and agreements hereinafter mentioned, the Government * * * [hereby leases the airfield to Lessee, for use as an airport, for a five-year term ending May 1, 1952], unless sooner terminated as hereinafter provided and subject to the following conditions and covenants:

1. This lease may be terminated by the Government as hereinafter provided. Further, this lease may be terminated by the Lessee at any time after presentation of a written notice to the Government not less than sixty (60) days prior to its intention to so terminate. It is agreed that the term of this lease may be renewed by the Lessee for an additional period of five years upon the same terms and conditions as set forth herein provided that in the opinion of the Secretary of the Navy the premises are not essential for governmental purposes only.

* * * * *

14. It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the Lessee, in writing, sixty (60) days prior to such termination, in the event of default with regard to the covenants and conditions of the lease or in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential.

* * * * *

The lease was extended under paragraph 1 for an additional five-year term, to run until May 1, 1957 (R. 24).

In April 1954, jurisdiction over the property was transferred from the Department of the Navy to the Department of the Army (R. 11, 436), which needed the property for use as an aerial defense missile (NIKE) site (R. 46). On July 27, 1954, a notice of revocation of the lease under paragraph 14, signed by both the Secretary of the Army and the Secretary of the Navy, was delivered to respondent (R. 11, 23–25). The notice recited that a state of national emergency had been declared by the President on December 16, 1950, that possession of the property "is required for military purposes," and that both Secretaries had determined that "revocation of the said lease is essential." The notice stated that the lease "is hereby revoked, effective September 27, 1954", and demanded that respondent vacate the premises by that date. (R. 23–25.)

Respondent refused to surrender possession of the property, claiming that the lease could be revoked only for the purpose of using the property for "Naval Aviation activities," within the meaning of the preamble of the lease, and could not be revoked in order to use the property for an Army missile site.[1]

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[1] On August 10, 1954, respondent filed a complaint seeking a declaratory judgment that the revocation was ineffective for that reason, but the complaint was voluntarily withdrawn on August 23, 1954, after the Government had asserted a lack of jurisdiction over the parties.

To obtain immediate possession, the Government, on October 6, 1954, instituted this condemnation action. The complaint (R. 9–12), to which a copy of the lease and of the notice of revocation was appended (R. 12, 23), recited that the lease had been revoked but that respondent refused to vacate the property and was "claiming an interest" therein. The complaint sought to acquire by condemnation "any possessory rights" in the property and, in particular, "all remaining outstanding right, title and interest, if any, of" respondent. The prayer was that the property be condemned, that an order be entered granting the Government immediate possession, and that "just compensation, if any" be determined and awarded. An order granting the United States possession was entered on the same day (R. 26–27).

By motions to strike respondent's answer and for summary judgment, the Government asserted that the lease had been revoked and that respondent therefore had no interest in the property. Both motions were denied and the case was set for a jury trial on the issue of valuation (R. 38–42). At the trial the court ruled that the Government, having elected to condemn respondent's leasehold interest, could not assert that the lease had been terminated and that the only issue to be tried was the valuation of the remaining term of the lease (R. 49–50, 67–68, 73, 93–94). At the close of the trial, the court (over timely objections) instructed the jury that the lease had not been canceled and was still in effect at the date of the taking; that in determining the value of the remaining term of the

lease the jury could take into account the fact that it was subject to future revocation under paragraph 14 but that it could be so revoked only upon a determination that revocation was "essential for aviation purposes"; and that the use of the property as a NIKE site was not an "aviation use" within the meaning of the lease (R. 421–422).

The jury returned a verdict finding just compensation for respondent's leasehold to be $25,000, and judgment was entered accordingly (R. 442). The Government's motion for judgment notwithstanding the verdict was, like its earlier motion for a directed verdict, denied (R. 386, 443–444). Respondent's motion for additur or, in the alternative, for a new trial on the ground of insufficiency of the verdict was granted, and, upon supplemental findings by the court that respondent was entitled to an additur of $50,000, an amended judgment was entered awarding respondent $75,000, plus interest from the date of taking (R. 446–448).

On appeals taken by both parties, the court of appeals held that the district court was without authority to allow additur and remanded the case with directions either to enter judgment on the jury's verdict or to grant the alternative motion for a new trial. On all other issues, the court, by a divided vote, affirmed the district court (App. 27–53). It held that the Government had "elected" to condemn respondent's leasehold interest rather than pursue its remedies to obtain possession under the revocation and that the Government's reliance on the revocation

"was entirely inconsistent with its condemnation complaint," since "In the same breath, the government proclaimed and denied defendant's ownership of the leasehold estate" (App. 43).

On the question of the effect of paragraph 14 on the value of the remaining term of the lease, the court held that that paragraph should be read in the light of the preamble and that, so read, the requirement in paragraph 14 of a determination that "revocation is essential" required a determination that it was essential "for aviation purposes." The court also rejected the argument that the authorizing statute required such leases to be revocable at any time, stating that it was "not convinced" that the statute supported the contention; that it "passes all credulity" that Congress so intended; and that it could be assumed that the Government acted in accordance with the statute when it prepared the lease (App. 46–47). In view of its first holding that the prior revocation was irrelevant, the court did not reach the Government's alternative contention that use of the property for a missile site ("aircraft" of a sort) was a proper reason for revocation even under the court's construction of the lease (App. 47).

REASONS FOR GRANTING THE WRIT

1. The Government needed property it had previously leased to respondent for use as a NIKE missile site. To obtain possession, it revoked the lease, claiming the right to do so under its terms and the authorizing statute. Respondent contended that the revocation was ineffective and refused to surrender

possession. The validity of the revocation could have been determined by an action in ejectment or to quiet title, but the Government could not delay construction of the NIKE site for the months or years required to conclude such an action. Moreover, it was willing to take the property by eminent domain if it was not otherwise entitled to it. To obtain immediate possession, therefore, the Government filed a complaint and a motion for possession in a condemnation proceeding. The complaint, although alleging that the lease had been validly revoked (and hence that respondent had no remaining interest in the property), nevertheless sought to acquire whatever interest respondent might be found still to possess.

The court below held that, by initiating a condemnation proceeding, the Government had foreclosed itself from asserting its rights under the revocation and hence that respondent must be deemed still entitled to possession and to compensation for the taking of that interest. In the court's view, the Government, if it wished to preserve its rights under the revocation, was required first to proceed by an independent action, such as ejectment, to obtain possession on that ground and only then, if that action was unsuccessful, initiate condemnation proceedings. Assuming, as the court of appeals did, that the revocation was valid, its holding in effect gave the Government the choice of either (*a*) paying for what already belonged to it or (*b*) postponing its taking of possession (and the installa-

tion of the NIKE site) until its ownership was established in independent proceedings.[2]

a. The importance of the question raised by that decision is manifest. Urgent governmental programs requiring acquisition of land to which the Government asserts an existing right must be delayed while that right is being litigated in independent proceedings. While the decision below would not, we believe, be followed by other courts of appeals, the risk of sacrificing the Government's independent claims to the property is one that administrative agents cannot take, and they must, therefore, forego condemnation proceedings in any case in which the Government claims an existing interest in the property until the question

[2] The suggestion of the court below (App. 41) that the Government might have obtained immediate possession by an action of ejectment, with the respondent then suing for compensation in the Court of Claims, is simply erroneous. In ejectment, possession could not have been obtained until after litigation of the merits. Apparently the court was referring to the Government's argument that it might have simply *seized* the property, under its powers of eminent domain, without benefit of judicial procedure. If so, it may be that the decision leaves it open to the Government to follow that procedure and then to assert its existing right to the property as a defense in the suit for just compensation—though it is not clear why the exercise of the power of eminent domain in that manner would be any less an "election", under the theory of the court below, than its exercise by judicial proceedings. Even if the decision could be so limited, however, it would still have serious consequences, since it would force the Government, in such cases, to abandon the orderly judicial procedure established by Congress, with its numerous protections for the condemnee, in favor of the essentially crude method of seizure, leaving the property claimant to a suit in the Court of Claims for his remedy.

of title has been settled in separate proceedings. For example, initiation of condemnation proceedings involving 700 acres of residential land on Galveston Island, Texas, to which the Government claims ownership and which probably have a value of thousands of dollars per acre, is now being postponed pending the outcome of this case. As this Court has said in a similar context, "Such a construction would be intolerable. The march of public improvement cannot thus be stayed by uncertainties, complications or disputes regarding the title to property sought to be condemned * * *." *United States* v. *Dunnington,* 146 U. S. 338, 350. The decision will likewise cause delay, inconvenience, and unnecessary expense to those claiming interests against the Government, who will be forced to protect their interests in two separate proceedings.

The question, moveover is clearly one of federal law. Even when federal condemnation proceedings were required by statute (cf. 50 U. S. C. 171) to follow local procedure, it was established that matters affecting the Government's substantive rights were governed by federal law. *United States* v. *Miller,* 317 U. S. 369. With the addition of Rule 71A to the Federal Rules of Civil Procedure in 1951, prescribing the procedure to be followed in condemnation cases, the supremacy of federal law was made complete.[3]

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[3] The scope of the analogous kinds of proceedings in Illinois state courts—which are "special, statutory and summary" (App. 39)—and the nature of the issues that can be raised in them are, therefore; clearly irrelevant. We do not concede, however, that the decision below is correct even under Illinois law.

b. The decision below is, we submit, plainly erroneous. The basic question is the scope of the issues that may properly be raised in a condemnation proceeding. The court's holding that the Government brought the wrong "form of action" (App. 41) is a return to pleading concepts long ago rejected by the Federal Rules. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U. S. 41, 48.

Admittedly, the Government did not intend to waive its existing rights to the property, and the court below suggests no reason why, as a matter of sound procedure, both those rights and the Government's right to condemn any interest found still to exist in respondent should not be asserted in a single proceeding. Since the Government asserted not only its present ownership of the property, but also its right to take any interests that might be found to be outstanding, it was entitled to immediate possession whatever the outcome of its ownership claim. There was therefore no obstacle to granting immediate possession and reserving the questions of ownership for resolution in determining what, if any, compensation was owing to respondent. The court below, however, concluded in effect that there was no "form of action" in which the right to immediate possession could be enforced while preserving the Government's rights of ownership. We suggest that to find the appropriate form

of action the court need only have looked to Rule 2 of the Federal Rules of Civil Procedure: "There shall be one form of action to be known as 'civil action.'"

Even on its own terms, the court's "election of remedies" rationale is unsupportable. The Government was not asserting an inchoate cause of action (*e. g.*, for a breach of contract by respondent) for which there were alternative remedies (*e. g.*, rescission of the lease or damages) among which it might elect but none of which it had yet enforced. Rather, the revocation notice, if valid, was self-executing and operated of its own force to terminate respondent's interest in the property. No judicial remedy was required to terminate the lease: if the notice was valid, it *was* terminated. Thus the court below was asked simply to recognize that the lease *had been* revoked, and not to give effect to an inchoate right in the government *to* revoke. No question of "remedies" was involved and there was posed only the problem, typical in condemnation proceedings, of ascertaining the owners of the property and allowing compensation accordingly.

Nor is there anything in the nature of a condemnation proceeding, even viewed as a limited "form of action," that makes determination of the issue of title raised by the Government inappropriate. "A condemnation proceeding is an action *in rem*. It is not the taking of rights of designated persons, but the taking of the property itself." *Eagle Lake Improvement Co.* v. *United States*, 160 F. 2d 182, 184 (C. A. 5), certiorari denied, 332 U. S. 762. For that reason

the condemnor is not "called upon to specify the interests that happen to exist." *Duckett & Co.* v. *United States*, 266 U. S. 149, 150–151. The burden is on those who claim an interest to prove their title and their right to compensation. Admittedly, disputes over title among private claimants to the property must be resolved in determining their respective rights to compensation. *E. g., Eagle Lake Improvement Co.* v. *United States, supra; National Refining Co.* v. *United States*, 160 F. 2d 951 (C. A. 8). While such cases may, as the court below suggests (App. 40), take the form simply of a litigation over the distribution of the fund, they are no more than a particular application of the principle that each claimant must establish his right to compensation. When the dispute over title is between a private claimant and the Government, the principle is no different. The question remains one of determining whether the claimant has any interest in the property, and it is essentially irrelevant whether the interest he claims would otherwise be in the Government or in someone else. Thus the precise issue in this case was not whether the Government was entitled to possession but whether respondent had any interest in the property for which he was entitled to be compensated—a question inevitably involved in any condemnation proceeding and which, we submit, must always be determined before compensation can be awarded.[4]

[4] The cases relied upon by the court below, in turn, in no way support its result. Only two of the federal decisions cited (App. 42–43) involved condemnation proceedings. The first of these, *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d

c. The decision below is in square conflict with the decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Turner*, 175 F. 2d 644. There, the United States initiated a condemnation proceeding to acquire land which had once been submerged by navigable waters but which had been filled in by the adjacent landowner, Turner. The United States alleged that the submerged land originally belonged to the state; that the state had deeded it to the United States; that Turner acquired no interest by filling it; and hence that Turner was entitled to no compensation. The district court upheld Turner's title and granted compensation. The court of appeals reversed, holding that title to the filled land was in the United States, but remanded for a determination of what part of the land was fast land. Judge Waller, dissenting

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161, 171 (C. A. 7), certiorari denied, 302 U. S. 714, was an earlier decision of the court below and contained only a statement that *under Wisconsin law*, which at that time was deemed controlling, a condemnor was required to allege the defendant's title and was bound by that allegation. Even that statement was apparently no more than dictum, since the court went on to show that the Government had, at the trial, made no claim of ownership to the land but had "tacitly acquiesced" in the defendant's claim and that the defendant had in any event adequately established its title. The second case, *United States* v. *11.48 Acres of Land*, 212 F. 2d 853, 855 (C. A. 5), is not in point. The court there held simply that, in taking an adjacent landowner's riparian rights by condemning in fee the bed of a river, the Government had taken *more* than its dominant servitude over navigable waters and was thus required to pay for what it had taken. To the extent that it is relevant at all, the decision is, in fact, contrary to that below, since the court considered and decided on the merits the Government's assertion of its existing rights in the river.

in part, argued that the suit, initiated to acquire title by condemnation, had been converted into "a suit to try title" and that the purpose of "confirmation of a title that it already owns seems to me to be so utterly and violently inconsistent with proceedings in eminent domain as not to be permissible" (p. 649). He noted that the Federal Rules were not then applicable (though they are now) and that there was no law or rule permitting "joinder of actions so inconsistent as to be repugnant" (*ibid.*). He further argued that, even if the action was permissible, the burden ought to be on the Government to prove title, as it would be in a suit to try title.

The case thus posed precisely the same issue as that in this case. The majority of the court, however, unlike the court below, expressly rejected Judge Waller's argument (pp. 648–649):

> I do not agree that the nature of this suit as a condemnation suit has ever changed. * * * The primary object was attained of getting immediate and undisputed possession. Any right or title of the United States was not waived, but the United States, I think, stood like any other claimant of the pledged fund. [5] Turner, Alabama and the United States had initially the same burden of identifying what land or interest, if any, each owned. Neither had any presumption as against the other. It did not become a suit in ejectment, or trespass to try title, but remained a condemnation suit with a

[5] There was in fact no fund deposited: "While no money was paid into court, the credit of the United States was substituted by the statutes applicable" (p. 648).

problem to be solved as to whose land had been taken, the burden being on each claimant to identify his land. The burden of course may shift as the evidence progresses.

d. The decision is also in square conflict with that of the Court of Appeals for the First Circuit in *United States* v. *San Geronimo Development Co.*, 154 F. 2d 78, certiorari denied, 329 U. S. 718. The United States had in 1921, under special statutory authority, leased to defendant's predecessor for 999 years part of a military reservation in Puerto Rico. The lease, as required by the statute, reserved to the United States the right to "free and unlimited use, without cost," of the land during a national emergency. Upon the outbreak of World War II, the United States asserted its right to use the land, but the defendant claimed that the reserved right had been terminated by a Presidential Proclamation in 1929 (which had conveyed certain property to the People of Puerto Rico). The United States filed a complaint seeking to acquire by condemnation the "temporary use and occupancy" of the land for the duration of the war, but asserting the right to that use under the original lease. The court of appeals, in an opinion by Judge Magruder, noted the unusual feature of the complaint, in that the United States was claiming an existing right to the very use it sought to condemn, but said (p. 83):

> * * * The validity of its claim to the right of free user might be tested by a complaint for a declaratory judgment or by a bill for specific performance of the provisions of the Baker

lease, or by some appropriate possessory action. In its petition the United States asked in effect for an adjudication that its right reserved in the Baker lease was valid and subsisting and entitled it to the wartime use and occupation of the premises for naval purposes without compensation to the various persons holding subleases derived from Baker; and, in the alternative, if that claim should be denied, it asked for a judgment condemning an interest in the tract and determining the amounts of just compensation payable to the various respondents named in the petition. Under the peculiar circumstances, there was much good sense in combining these alternative and mutually exclusive theories in a single proceeding, and we are not prepared to say that the procedure followed was inappropriate.

The court then held that the United States was entitled to use of the land under the lease without compensation and directed entry of a judgment so declaring. The court below disposed of this case as having "reluctantly" upheld the procedure as an "unfamiliar hybrid" (App. 40–41) but failed otherwise to distinguish it. While we question the characterization of Judge Magruder's opinion as "reluctant," the conflict, like the dragon, is no less real for that reason.

Other decisions which conflict in result with the decision below, though the issue was not expressly discussed, are noted in the margin.[6]

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[6] *Wittmayer* v. *United States*, 118 F. 2d 808 (C. A. 9): A complaint condemning property patented to defendant and the subsequent accretions thereto from the Missouri River was later amended to allege that the accretions were in the public do-

2. The second question presented is one of construction of the lease and, more importantly, of the leasing statute—*i. e.*, whether the Government had a right to revoke the lease to use the property for a missile base. If it did, then, on the one hand, the revocation was valid and respondent had no interest in the property. On the other hand, even if there had been no previous revocation (or, as the court below held, the Government was estopped to assert it), the existence

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main and did not belong to defendant. The issue of title to the accreted lands was tried to the court, which entered judgment quieting title in the United States. The court of appeals affirmed.

United States v. *10,245 Acres of Land*, 50 F. Supp. 470 (E. D. Wash.): In a condemnation proceeding against land claimed as a homestead, the Government was allowed to show that the claimant had failed to make improvements within the time required in order to perfect his homestead title and hence that his inchoate title, being subject to cancellation of his entry at any time, was worthless. The court rejected the claimant's argument, analogous to that of the court below, that the Government was "bound by its deposit [of the estimated value of the land] and is estopped from contesting defendant's right to secure at least the amount deposited" (p. 472).

An analogous case, though perhaps not in actual conflict, is *Tennessee* v. *United States*, 256 F. 2d 244, 256–257 (C. A. 6). The state had acquired in fee and deeded to the United States the right-of-way for a highway. A telephone company claimed a permanent easement over the right-of-way for its existing telephone line, while both governments contended that the company had only a permissive right and was required, under state law, to relocate its line so as not to obstruct the highway. To resolve the issue, the United States initiated a condemnation proceeding to condemn all interests in the land that it did not already possess. Without question, the United States was allowed to assert (successfully as to part of the line) both its and the state's rights to require relocation of the line without compensation.

of the *right* to revoke the lease for that purpose would have made the respondent's interest of no substantial value. At the date of the taking, it was known that the Government needed the property for a missile base and hence known that, had there been no condemnation, the Government would have promptly exercised its right to revoke the lease. If the Government had that right, respondent's defeasible interest was worth only the value of the use of the property during the 60-days' notice that would be required for the exercise of that right—simply a reasonable period in which to vacate the premises, and of no significant value. Thus the question of the scope of the right of revocation is the same whether or not the prior revocation is to be given effect. In short, under our view of the lease and statute, either respondent had no interest in the property (because of the prior revocation) or the defeasible interest it did have was of no substantial value (because of the impending revocation).

The court below held, however, that the lease could be revoked only upon a determination that revocation was "essential for aviation purposes".[7] That hold-

[7] Both courts below, having held that the prior revocation could not be asserted, dealt with the question solely in terms of the effect of the right of revocation on the value of the remaining term of the lease. The district court instructed the jury that the right could be exercised solely for "aviation purposes" and that use of the property as a missile base was not such a purpose (R. 421). Since the evidence disclosed that there was no existing need of the property for "aviation purposes" as thus limited (*e. g.*, R. 432–434), there was, under that construction, little likelihood of the lease being revoked before

ing, we submit, was based on an erroneous interpretation not only of the lease itself but also of an important federal statute.

a. The sole basis for the court's interpretation is the recitation in the preamble of the lease that "it is considered essential that the said airfield * * * be retained in a stand-by status for post-war use in connection with Naval Aviation activities."[8] On its face, however, that statement was simply a recital of the justification for the Department's keeping the property in a stand-by status (by leasing it) rather than declaring it surplus and disposing of it, and was in no way directed to the scope of the reserved right of revocation. Paragraph 14, in turn, imposes no limitation of "purpose" but provides, without qualification, that the lease shall be "revocable at will * * * in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential." The answer to the court's question "essential for what?" (App. 45), if one is needed at all, is to be found not in the unrelated recitals of the pre-

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expiration of the remaining term (2 years and 8 months), and the jury clearly so concluded.

The court of appeals held that the right to revoke was exercisable only "for aviation purposes" but thought it unnecessary to decide whether use of the property as a missile base was within such "purposes" (App. 47). However, since such use presented the only practical likelihood of the lease being revoked and the jury had obviously based its verdict on the instruction that the lease could not be revoked for that purpose, it was clearly error to affirm the judgment without considering that question.

[8] All the relevant parts of the lease are set forth in the Statement, *supra*, pp. 4–5.

amble but in the directly analogous provision in paragraph 1 that the lease could be renewed for an additional term only if the Secretary found that the property was "not essential for governmental purposes only." If significant at all, the lack of the same qualification in the otherwise similar revocation provision means that the latter provision was, if anything, to be less restrictive. Finally, that the broad scope of the Government's revocation rights was neither unintended nor harsh is shown by the fact that the respondent was given an even broader right to terminate the lease "at any time" (¶ 1).

b. While we believe the error of the decision below is apparent from the terms of the lease itself, of greater concern is the court's holding that its construction of the lease does not contravene the express provisions of the authorizing statutes that such leases are to be revocable "at any time."[9] The statutes are unequiv-

[9] Acts of August 29, 1916, and August 5, 1947, *supra*, pp. 2–4. The 1916 Act authorized the Secretaary to lease property "for periods not exceeding five years and revocable at any time." The 1947 Act provided that each lease "shall contain a provision permitting the Secretary * * * to revoke the lease at any time." It then provided that the revocation provision might be omitted upon a "public interest" determination but that "In any event each such lease shall be revocable by the Secretary * * * during a national emergency."

Since the two Acts are substantively the same in all aspects relevant here, it is unnecessary to decide whether the instant lease is controlled by the 1916 Act, in effect when the original lease was executed, or by the 1947 Act, in effect when the lease was renewed for an additional five-year term. If the renewal were pursuant to a binding option in respondent, arguably the 1916 Act should govern. However, since the 1916 Act prohibited leases exceeding five years, it would seem that the ex-

ocal and leave little room for construction.[10] The court of appeals, indeed, attempted no such construction but contented itself with the assertion that Congress could not have intended what the statutes seem clearly to say. Even that, however, misconceives the purpose of the leasing authority, which was not to make landlords of the military departments but simply to provide an economical way of keeping essential defense facilities in a state of readiness, or "stand-by", until needed. The revocable lease keeps the facilities available upon call, effects their maintenance in the meantime, and permits a beneficial interim use. The pervading concept, in short, is the priority of military needs, with private use being authorized only pending a military need.[11] See, *e. g.*, S. Rep. No. 626, 80th Cong., 1st Sess. pp. 2–8.

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tension could be given effect only as a new agreement between the parties. The broad power of the Secretary to refuse the extension (see ¶1) also suggests that result. For these reasons, it is our view that the 1947 Act is controlling. As already noted, however, there seems no need to resolve that issue.

[10] The court of appeals does not, and of course could not, question that any right of revocation required to be reserved by the statutes would be binding upon lessees taking under them. See, *e. g.*, *Todd Dry Dock & Constr. Corp.* v. *Sumner Iron Works*, 289 Fed. 217, 220 (C. A. 9), certiorari denied, 263 U. S. 700. The right of revocation during a national emergency provided by the 1947 Act, moreover, does not even in form require a revocation provision to be included in the lease but is operative of its own force. See note 9, *supra*.

[11] The 1947 Act, by authorizing a right of first refusal to be given the lessee, expressly contemplates that such leases may be revoked for the sole purpose of selling the property (see p. 3, *supra*).

In view of the extensive use of "stand-by and maintenance" leasing arrangements by all three military departments and the obvious need, in times of rapidly-developing crises, of maximum flexibility in recalling leased defense facilities into service, the question of the revocability of such leases under the leasing statutes is of widespread importance.[12] While the effect of the decision below might be avoided as to future leases by even more explicit terms than here, no doubt many of the leases now outstanding are subject to the same kind of interpretation as that adopted below.[13] In addition, one of the very purposes of imposing a statutory requirement of revocability would seem to

[12] The 1947 Act (see note 9, *supra*) applies to all the military departments. See 5 U. S. C. 626s–3; 10 U. S. C. (Supp. V) 2667; 34 U. S. C. 522a.

[13] Compare, for example, the recent decision of the Court of Claims in *Hingham Management Corp.* v. *United States*, No. 219–54 (Oct. 8, 1958). There the preamble of the lease recited that the facilities "are not, for the time being, required for public use," while the termination provision provided, in accordance with the 1947 Act, that the lease could be terminated "at any time * * * During any national emergency." The Government, believing that the lessee was misappropriating property from the leased premises, terminated the lease under that provision and re-let the property on the same day to another lessee. The Court of Claims rejected the lessee's contention (in a suit for damages) that the right of termination was impliedly limited to circumstances when the property is needed in connection with the national emergency or for a public use and held that the reserved right of termination was "absolute and unconditional". (As an alternative holding, the court also pointed out that the purpose of protection of the facilities from misappropriation was sufficiently related to the national emergency to justify the termination even if the lessee's argument were accepted.) Although the precise terms of the leases are different, the decision below conflicts at least in principle with that of the Court of Claims.

have been to avoid reliance solely on administrative officers adequately to protect the Government's interests in drafting such leases and to make clear beyond doubt that all such leases are fully revocable. That purpose is frustrated by the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully,

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DECEMBER 1958.

APPENDIX

In the United States Court of Appeals for the Seventh Circuit

October Terms, 1957—April Session, 1958

Nos. 12191–12192

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, APPELLEE

v.

93.970 ACRES OF LAND, MORE OR LESS, SITUATE IN COOK COUNTY, STATE OF ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED, DEFENDANT-APPELLEE, APPELLANT

July 15, 1958

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Before MAJOR, FINNEGAN, and SCHNACKENBERG, *Circuit Judges*

MAJOR, *Circuit Judge:* This is a condemnation proceeding instituted by the United States to acquire all outstanding rights, if any, which defendant had in premises in Cook County, Illinois, on which was located an airport, under lease from the government. The lease under which defendant occupied the premises was executed May 2, 1947, with certain modifications made February 9, 1948. The lease granted to lessee (defendant) the option of renewing the lease for a period of five years. This the lessee did. Thus,

the lease as renewed extended to May 2, 1957. The lease contained a provision which authorized its revocation by the lessor under certain conditions, subsequently discussed. The government sought to exercise this power of revocation, effective September 27, 1954. Copies of the lease, the amendment thereto and the government's notice of revocation are attached to and made a part of the complaint.

Defendant refused to honor the notice of revocation and vacate the property. On August 10, 1954, it sought in the District Court a declaratory judgment that the revocation was ineffective because the government proposed to use the property for purposes other than those described in the lease as a basis for its right to revoke. The defendants in that action refused to waive immunity and moved to dismiss the complaint for lack of jurisdiction. Thereupon, plaintiff in that action withdrew its complaint. The government instituted the instant action October 6, 1954, and was awarded immediate possession of the premises, with certain reservations not here material. The government by its condemnation action sought to acquire "all remaining outstanding right, title and interest, if any" of defendant in the property and to ascertain "just compensation, if any."

Defendant in its answer to the complaint sought just compensation for the remaining term of the lease, that is, for a period of about 2½ years, or until May 1, 1957. It admitted receiving the notice of revocation but alleged that it was ineffective because it was not made in conformity with the terms of the lease. Defendant's answer also alleged that in filing a condemnation action, instead of ejectment or a similar action, the government elected "a remedy which is inconsistent with the theory that defendant has no possessory right and therefore implicitly recognizes

the existence of a leasehold interest and is precluded as a matter of law from asserting that the lease has been terminated."

The government moved to strike defendant's answer, and for findings and judgment that defendant was not entitled to possession after September 27, 1954, and was, therefore, entitled to no compensation. The basis for the motion was that the answer set up no valid defense because defendant's tenancy expired by reason of the revocation, notice of which defendant admittedly received, which effectively terminated its interest on September 27, 1954, and for the further reason that the necessity for taking by the government was not a matter for judicial inquiry. Upon denial of this motion, the government moved for summary judgment of no compensation on the basis that there was no issue of fact concerning the lease and its revocation and that as a matter of law the lease was validly revoked prior to commencement of the action. This motion was also denied.

The case was tried before a jury on the issue of compensation. At the inception of the trial the Court ruled that the government could not introduce in evidence or make any reference to the revocation notice, for the reason that it had selected the remedy of condemnation which necessarily acknowledged an outstanding leasehold interest in defendant for the full part of the term remaining, October 6, 1954 to May 1, 1957. Much testimony was offered by each of the parties as to the value of the remaining leasehold interest. It is unnecessary at this point to relate this testimony. It is sufficient to note that the witnesses for the government, based on its interpretation of the lease, testified that the interest sought to be taken had no value and as a result the government was entitled to a finding of no compensation. On the other hand,

defendant's witnesses, based on its interpretation of the lease, placed various estimates upon the value of defendant's remaining interest in the lease.

At the conclusion of the evidence, the government's motion for a directed verdict of no compensation was denied. Consistent with this ruling and also with that made at the inception of the trial, the Court denied the government's request for the submission to the jury of a form of verdict which would have permitted a possible finding of no compensation. The jury returned a verdict in the amount of $25,000, and on April 16, 1957, judgment was entered in said amount in favor of defendant. After a consideration and disposal of various motions the Court, on July 9, 1957, filed findings of fact and conclusions of law wherein it found and concluded that defendant was entitled to an additur of $50,000 (making a total base award of $75,000), with interest at 5% from October 6, 1954, the date of taking. On the same date the Court entered what it labeled an "amended judgment," in which it was recited that defendant was entitled to an award of $85,375.02. It is evident that this judgment included $50,000, the amount allowed as additur; $25,000, the amount awarded by the jury, and $10,375.02, interest on the sum of $75,000 from the date of taking.

The government has appealed from the so-called amended judgment of July 9, 1957. No mention is made in its notice of appeal of the judgment entered April 16, 1957 (the first judgment). Defendant cross-appealed from the so-called amended judgment of July 9, 1957 (the second judgment) in its favor, on the ground that the Court erred in failing to increase the award to the lowest level of value established by uncontradicted testimony. This so-called uncontradicted testimony refers to that offered by defendant

upon its theory of the case, which was that embraced by the trial Court.

We are met at the inception with the important and troublesome contention advanced by defendant that the government, having appealed only from the so-called amended judgment of July 9, 1957, is precluded from here raising any issue other than that relative to the allowance of an additur. More specifically, it is contended that the government by its failure to appeal from the judgment of April 16, 1957, is without right to a review of the issues both of law and fact which were raised and decided in the trial which resulted in that judgment. The importance of this contention is at once apparent because, if sustained, it is decisive of all issues other than that which relates to the Court's allowance of the additur. We have, therefore, up to this point stated only such of the proceedings as we deem essential to bring into focus the instant question.

It is hardly open to doubt but that the first judgment standing alone was final and, therefore, appealable. It is equally certain that the Court, either on its own volition or at the instigation of the parties, possessed the authority within an appropriate time to vacate, modify or amend that judgment. We also think that in determining the question of the finality of the first judgment it should not be confined in a vacuum, separate and apart from the proceedings which followed.

On April 22, 1957, the government filed its motion to vacate the April 16 judgment and prayed that a judgment of no compensation be entered for plaintiff, notwithstanding the jury verdict. On April 24, 1957 (eight days after the entry of the judgment), defendant filed its motion calling attention to the fact that the judgment did not include interest, and prayed

"that the judgment heretofore entered herein be altered or amended" to include interest. On the same date, defendant filed its motion for additur or, in the alternative, for a new trial. In this motion defendant prayed "that the Court substantially increase the jury's verdict by an additur and enter an amended judgment for the amount of such increased award" or, in the alternative, grant defendant a new trial.

Thus, in two respects defendant sought to amend the judgment: first, by the addition of interest and, second, by the allowance of an additur. That the defendant succeeded in both respects is evidenced by the fact that the second judgment included interest and the allowance of an additur. The second judgment also specifically included $25,000, the amount of the jury award, which had been incorporated in the first judgment. It is not discernible how it can be logically held that there are now two final judgments (defendant's contention requires such a holding). It is certain that defendant would not be entitled to a satisfaction of both judgments. Satisfaction of the second would *ipso facto* satisfy the first. Conversely, satisfaction of the first would entitle the government to a *pro tanto* credit on the second. In our view, the first judgment was merged in and became a part of the second. By such merger the first judgment was obliterated as effectively as if it had been expressly vacated by the Court. It is evident that the parties as well as the Court intended such result. Moreover, the result was accomplished at the behest of defendant which, as shown, was urging the Court to enter an "amended judgment," not another judgment separate and distinct from the first.

Defendant in its brief asserts that its contention on this issue is "completely supported" by the follow-

ing cases: *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206; *Durkin* v. *Mason & Dixon Lines, Inc.*, 202 F. 2d 425, and *Delta Drilling Co. et al.* v. *Arnett*, 186 F. 2d 481. In our view, these cases furnish feeble, if any, support for defendant's contention. It is pertinent to note that none involved a condemnation proceeding. In the *Honeywell* case there was involved a cease and desist order issued by the Federal Trade Commission, and the question before the Court was whether the petition for certiorari has been filed in the time designated by statute. A solution of this question required a determination as to when the statutory period commenced to run, that is, from an order of July 5, 1951 or from an order of September 18, 1951 (orders of this Court on petition for review). True, the Court held that the first order was final, but upon the basis that it had not been substantially altered by the second order. As the Supreme Court stated concerning the second order (page 212), "It reiterated, without change, everything which had been decided on July 5." Relative to the issue of finality, the Court in its discussion stated (page 212):

> The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

The *Durkin* case involved an action for failure to pay overtime wages. Two periods of time were involved. As to the first, the trial Court dismissed the claim, but allowed recovery as to the second for an amount which was to be determined in accordance with a pre-trial stipulation of the parties. The Court of Appeals held that the order was final because it

"settled all the equities between the parties and finally determined their rights."

The *Arnett* case involved the title to or ownership of certain oil and gas rights, with a prayer for an accounting. Two judgments were entered in the case and the Court of Appeals held that the first judgment was final because it settled the case on the merits. Nothing was added to the second judgment other than the result which flowed from an accounting which had been provided for by the first judgment.

It appears settled by the cases that just compensation is a material issue in every condemnation suit and that there can be no finality of judgment until this issue is definitely disposed of. In *McCandless et al.* v. *United States,* 298 U. S. 342, 348, the Court stated:

> In an eminent-domain proceeding, the vital issue—and generally the only issue—is that of just compensation.

In *Catlin et al.* v. *United States,* 324 U. S. 229, the Court had before it the issue of the finality of a judgment in a condemnation proceeding. In its discussion the Court made the following pertinent statement (page 233):

> Hence, ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here.

The same rationale was followed in *United States* v. *Richardson,* 204 F. 2d 552, 555.

We are not able to discern how it can be held that the first judgment, in view of subsequent proceedings, disposed of the whole case or that defendant can con-

sistently contend that it was an award of just compensation for the property right sought to be taken. This is so even though it be thought that such judgment standing alone possessed all the indicia of finality under the rationale of the Supreme Court in *Catlin*. Its finality, if such it had, at the time of entry was emasculated by subsequent proceedings which culminated in the second judgment from which the appeal is taken. It is, therefore, our view and we so hold that the government by its appeal from the second judgment is entitled to a review of the issues which it here presents.

We now come to the contested issues relating to the proceedings in the District Court. As stated in the government's brief (with no objection on the part of defendant), they are as follows:

> 1. Whether, in this condemnation proceeding by the United States to reacquire possession and to clear title to property which it had leased to Illinois Aircraft Company, the district court erred in refusing to enter judgment of no compensation on the basis of prior revocation of the lease because it ruled (*a*) that the use of a condemnation action constituted election of a remedy which admitted an outstanding leasehold interest and (*b*) that the lease had not been validly revoked under its terms.
>
> 2. Whether, on the issue of the value of the remaining term of the leasehold which had to be tried under the foregoing rulings, the court erred (*a*) in stating before the jury that it would set aside a verdict of no compensation, (*b*) in receiving evidence of gross and net income from the airport operation or the trailer and barracks housing operation, (*c*) in receiving piecemeal valuations for the separate operations on the property and (*d*) in receiving evidence of value based on a construction that the lease was not revocable except "for Naval avia-

tion uses" and that it authorized use of the property for a trailer park and barracks housing not related to the airport function.

3. Whether the court erred in trebling the verdict of the jury by purported additur and in awarding interest on the enlarged award.

Defendant enumerates other contested issues, all of which relate to the additur which the Court included in its second judgment of July 9, 1957. These issues are here by reason of defendant's cross-appeal. They need not be stated at this point as their relevancy will depend upon our disposition of the issues raised by the government.

Prior to the commencement of the trial, the Court ruled that the government could not introduce in evidence or make any reference to the revocation notice (which the government had served on defendant), on the ground that the government had selected the remedy of condemnation, which necessarily acknowledged an outstanding leasehold interest in defendant for the unexpired portion of the lease, that is, from October 6, 1954, to May 1, 1957. In connection with this ruling the Court stated:

> The court presumes that the Government knew what it was doing, it had some advantage to gain by filing a proceeding under condemnation rather than following the other procedure, which raised a very highly technical point in controversy which the Government sought to avoid, and properly, in my judgment.

Also, at the beginning of the trial, the Court stated in the presence of the jury:

> If they [the jury] found no money at all, counsel, I would be compelled to grant a new trial, and we would be wasting their time, and this should not be submitted to the jury except on the basis of finding a fair value, and no value

> would be just the kind of a verdict I would have to reverse.

Consistent with this ruling, the Court denied a request by the government for a directed verdict and also a request that there be submitted to the jury a form of verdict to be used in the event the jury found that defendant was entitled to no compensation.

The parties devote much effort to the question as to whether the issue of election of remedies in a condemnation suit is to be determined by Federal or State law. In our view, we need not be concerned with this question because the reasoning employed by both the Federal and State courts of Illinois leads to the same result. A more disturbing matter is the dearth of cases in both jurisdictions which have considered the doctrine in condemnation proceedings.

We shall first refer to Federal cases other than those in condemnation, where the doctrine has been discussed and applied. In *Henderson Tire & Rubber Co.* v. *Gregory et al.*, 16 F. 2d 589, 593, the Court cites many cases in support of the statement that the doctrine is widely recognized both in Federal and State courts. From the cited cases the Court concluded:

> (1) The essential elements of the doctrine are (*a*) the existence of the two remedies; (*b*) the inconsistency between the remedies; (*c*) the choice of one of the remedies.

The doctrine was applied in *Intertype Corp.* v. *Pulver*, 2 F. Supp. 4, 6 (affirmed 65 F. 2d 214). In that case it was held that replevin would not lie because plaintiff had previously sought unsuccessfully to foreclose a chattel mortgage on the same property. In *Van Winkle et al.* v. *Crowell et al.*, 146 U. S. 42, it was held that a seller was precluded from maintaining an action of detinue to recover property after at-

tempting, although unsuccessfully, to enforce a lien thereon. In *United States* v. *Oregon Lumber Co. et al.*, 260 U. S. 290, it was held as to a voidable sale of land on account of fraud that the plaintiff was entitled to either disaffirm and recover the lands or affirm and recover damages for the fraud, but that it could not do both. After holding that the rule was applicable to the government, the Court stated (page 295):

> Any decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these inconsistent conclusions.

Of the numerous other instances where the doctrine under consideration has been recognized in the Federal courts, see *Bierce* v. *Hutchins*, 205 U. S. 340, 346; *Zimmerman* v. *Harding*, 227 U. S. 489, 33 S. Ct. Rep. 387, 389.

Now, turning to Illinois cases, we note those wherein the doctrine has been applied in condemnation proceedings. In *The Metropolitan City Railway Co.* v. *The Chicago West Division Railway Co.*, 87 Ill. 317, the Court stated (page 322):

> Petitioner, after invoking the aid of the law to condemn certain property of defendant, will not be permitted to stultify itself by insisting defendant has no interest in that which it seeks to condemn to its own use under the Eminent Domain Act.

In *The Sanitary District of Chicago* v. *Pittsburgh, Ft. Wayne and Chicago Ry. Co. et al.*, 216 Ill. 575, the Court held that the averments of the petition as to defendants' interest or title were binding on peti-

tioner but not on the defendants. The Court stated (page 579):

> If a corporation entitled to exercise the right of eminent domain claims that it already has a right to take land, a petition for condemnation is not the proper proceeding to try that question. It was the duty of the petitioner to ascertain the title to the premises before commencing the proceeding and to name in the petition the owner of the premises, and if the title was less than a fee simple or subject to an easement it should have been stated in the petition.

In *The Department of Public Works and Buildings* v. *Otto F. Sohm,* 315 Ill. 478, the Court in a condemnation case, on facts similar in many respects to those of the instant case, held that the right of possession was not a proper issue in condemnation but that it should be determined in ejectment. The Court among other things stated (page 483):

> The proceeding is special, statutory and summary, its sole object is to ascertain the compensation to be paid, and the amount is the only issue.

The Court reiterated what it had previously held, that averments in the petition as to title are binding on petitioner and that petition for condemnation is not a proper proceeding to vindicate a right which petitioner otherwise has to take the land.

The Federal courts recognize, as do the Illinois courts, that the sole object of condemnation is to ascertain just compensation for that which is taken. Reiterating our previous quotation from *McCandless et al. v. United States,* 298 U. S. 342, 348:

> In an eminent-domain proceeding, the vital issue—and generally the only issue—is that of just compensation.

In *Danforth* v. *United States,* 308 U. S. 271, 284, the Court stated:

> Condemnation is a means by which the sovereign may find out what any piece of property will cost.

The government argues that claims based on liens or contracts may be settled, and clouds on titles resolved, in condemnation proceedings. This is true no doubt where such claims or rights are incidental to the taking of property, for which just compensation is to be awarded. The government in support of this contention cites *Eagle Lake Improvement Co. et al.* v. *United States,* 160 F. 2d 182, and *National Refining Co.* v. *United States,* 160 F. 2d 951. Neither case is of any aid to the government. In the *Eagle* case the question was as to the manner of dividing the compensation award between a fee owner and a lessee. However, the Court made the pertinent observation (page 184):

> A condemnation proceeding is an action *in rem*. It is not the taking of rights of designated persons, but the taking of the property itself.

The *National Refining* case is even more remote. In that case the compensation award was paid by the government into the registry of the Court and the litigation was between rival claimants to the fund.

The government asserts that condemning property of which it claims ownership is common practice. In support of the statement it cites *United States* v. *San Geronimo Development Co., Inc., et al.,* 154 F. 2d 78; *Wittmayer et ux.* v. *United States,* 118 F. 2d 808, and *United States* v. *10,245 Acres of Land,* 50 F. Supp. 470. The nebulous support which these cases furnish the government's assertion is an indication of the

weakness of its position. In none was it sought to invoke the doctrine of election of remedies. It is true that in the *San Geronimo* case the Court reluctantly approved a petition for condemnation which contained a provision that it was without prejudice to the right of the government to dispute the claim of any party for compensation. The Court did this after characterizing the proceeding (page 80) as an "unfamiliar hybrid, and the substantive question upon which the decision turns is a special and non-recurring one as to which there are no precedents to indicate the answer." There is nothing in *Wittmayer* of any pertinency. In the *10,245 Acres of Land* case, the government in connection with the declaration of taking made a deposit of estimated value. It developed, however, that the person who laid claim to the homestead (the premises sought to be condemned) had not perfected his rights and had no interest therein. In the action reported it was held that the government was entitled to a return of its deposit. The case has no bearing here.

The government points out what undoubtedly is a fact, that it might have proceeded in ejectment in order to secure possession. From this premise it argues that the defendant has not been hurt by the instant proceeding because if the government had obtained possession in an ejectment action, defendant would have been relegated to the filing of a claim in the Court of Claims, to which the government could have pleaded that it had no interest because of the revocation of the lease. In our view, this argument is beside the issue. We are not concerned with what the rights of the parties might have been had the government proceeded in some other form of action. We are now concerned only with the rights in the con-

demnation proceeding which the government elected to pursue.

Defendant places much reliance upon a decision of this Court, *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161. In that case the government contended that the defendant had failed to establish any interest in a certain portion of the condemned property. The Court, after noting that the action was prosecuted in accordance with the laws of Wisconsin, stated (page 171):

> It is the law of that state that where proceedings are instituted to condemn property, and the petition recites, as it must, title and ownership or interest by the defendant, the condemnor is thereby bound by such expressed recognition of title, and cannot be heard to assert the contrary nor compel one recognized as owner to prove or defend his title.

The Wisconsin rule thus announced and followed by this Court is no different, as previously shown, from that adhered to by the courts of Illinois.

In *United States* v. *11.48 Acres of Land*, 212 F. 2d 853, the Court employed similar reasoning and reached the same result. In that case the government condemned the fee simple title and attempted to defeat the payment of just compensation on the contention that the contemplated use would be a mere exercise of the government's dominant servitude over navigable waters. In short, the government contended that it should not be required to pay just compensation because it had an existing right to use that which it sought to condemn. The condemnee argued "that the Government has elected to take his riparian rights by eminent domain and that he is therefore entitled to just compensation." The Court, in sustaining the latter contention, stated (page 855):

> We think that the appellee's alternative contention is sound, and, hence, we do not reach the question of whether the use intended by the Government would be a mere exercise of its servitude over navigable waters. Appellee's property was always subject to that dominant servitude. Its exercise involved no taking of private property within the meaning of the Fifth Amendment, and necessitated no condemnation proceeding. The United States has elected to take the fee simple, absolute, and indefeasible title to the lands.

The government concedes that it had remedies, other than that of condemnation, by which it might have obtained possession of the property in controversy. This it could have done without the payment of any compensation on its theory that defendant's interest in the leasehold property had been extinguished by the government's revocation made in conformity with the terms of the lease. Instead, it elected to institute the instant action to condemn defendant's leasehold interest. It thus, as must be done in all condemnation cases, invoked the jurisdiction of the Court for the purpose of determining just compensation to be awarded for that which it sought to condemn. In reality, that was the sole issue to be tried in the District Court.

In our view, the trial Court properly ruled that the government was without right to rely upon its purported revocation of the lease. Such a position was entirely inconsistent with its condemnation complaint. In the same breath, the government proclaimed and denied defendant's ownership of the leasehold estate. Such an absurd position is not countenanced by law, as we understand it, and neither is it supported by logic, reason or common sense.

This brings us to the rulings of the Court as well as the testimony of the respective parties relative to the just compensation to be awarded. This requires some consideration of the terms of the lease, because the extent of defendant's claim or interest in the leasehold estate is dependent upon such terms. This is forcibly illustrated by the testimony of the witnesses for the respective parties on the issue of just compensation. Witnesses for the government, based upon its interpretation of the lease, testified that defendant's interest had no value, while defendant's witnesses, predicated upon its interpretation, testified that defendant's interest had great value.

The lease, as already shown, was executed May 2, 1947, for a term of five years, and was between the Navy Department, on behalf of the United States of America, and defendant. Defendant, exercising an option contained in the lease, renewed it for an additional five-year term. On April 28, 1954, at the request of the Department of the Army, jurisdiction of the premises was transferred by the Navy Department to the Department of the Army and the lease was formally assigned to it. Defendant was notified of the transfer and tendered rental to the new agency designated.

There is no question but that the lease conferred upon the government the power of revocation. The controversy concerns the manner, purpose and by whom such power might be exercised. The government's theory, rejected by the trial Court, is that it could revoke at any time and apparently for any purpose. On the other hand, defendant contends, and the trial Court held, that the lease was revocable only upon "decision by the Secretary of the Navy that such revocation is essential for aviation purposes." It is not disputed on either theory but that the lease could

be revoked only in the event of a national emergency, that such emergency had been declared by the President on December 16, 1950, and was in existence at the time of the execution of the lease and still is in existence.

The heart of the controversy resides in paragraph 14 of the lease, as follows:

> It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the Lessee, in writing, sixty (60) days prior to such termination, in the event of default with regard to the covenants and conditions of the lease or *in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential.*

The italicized language is that of the government, as shown in its brief, and it is upon that clause that reliance is placed. The last word of the paragraph is "essential," and the question at once arises, essential for what? It would only unnecessarily add to the length of this opinion, which at best will be too long, to discuss or analyze the lease in detail. We have carefully studied its terms and we agree with the trial Court that the lease was revocable only upon a decision by the Secretary of Navy that such revocation was essential for aviation purposes. The preamble recited that "Government is the owner in fee simple * * * of the United States Naval Outlying Airfield, Arlington Heights, Illinois," that "because of its strategic value, it is considered essential that the said airfield and the facilities thereon * * * be retained in a stand-by status for post-war use in connection with Naval Aviation activities," that "the Lessee desires to lease the airfield and the facilities thereon for use as an airport and for such other uses

as may be necessary or incidental to this purpose," and that such use "will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary deemed to be in the best interest of the Government."

The government argues that this preamble portion of the lease is of little or no consequence in evaluating the agreement of the parties as contained in the granting clauses which followed. This argument, however, overlooks the clause which immediately follows the preamble, "Now Therefore, in consideration of the foregoing, and of the covenants and agreements hereinafter mentioned, the Government * * * acting under the direction of the Secretary of the Navy, does hereby grant, rent, lease and demise unto the Lessee * * *." We think this language made the preamble a part of the operative portion of the lease. See *Wall et al.* v. *The Chicago Park District*, 378 Ill. 81. For this and other reasons which we need not enumerate, we think the word "essential" clearly refers to aviation, the purpose for which the field had been employed and that for which the Navy desired its retention.

The government calls our attention to the Act of August 29, 1916, 34 U. S. C. 522, which was replaced by the Act of August 5, 1947, 34 U. S. C. 522 (a), which it is claimed precluded the Secretary of Navy from entering into a lease other than one "revocable at any time." We have read these provisions and are not convinced that they support the government's contention. It passes all credulity that Congress would require that a lease be revocable at any time irrespective of the conditions existing or the reasons assigned therefor. More importantly, the record shows that the lease was prepared by the Secretary of Navy or his subordinates, and we think it safe to assume that

they were aware of their rights under the law and acted accordingly.

In view of the holding of the trial Court, which we have sustained, that the government was precluded from relying upon its notice of revocation, we see no point in discussing it. As we have already said, the revocation provision of the lease is now material only as it bears upon the extent of defendant's interest in the leasehold property and consequently the compensation to which it was entitled on its taking by the government.

We now come to the government's contention that the Court committed prejudicial error in its rulings on evidence relating to the value of defendant's leasehold interest. What we have heretofore said is dispositive to a considerable extent of the argument on this point. The general rule undoubtedly is that just compensation is to be determined by the fair cash market value of the property at the time of taking. The cases, however, recognize that this rule cannot be adhered to in situations where the property taken is unique. See *United States* v. *Two Acres of Land,* 144 F. 2d 207, *The City of Chicago* v. *Farwell et al.,* 286 Ill. 415, *The Sanitary District of Chicago* v. *Pittsburgh, Ft. Wayne and Chicago Ry. Co. et al.,* 216 Ill. 575, and *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312. Certainly the Court was presented with an extraordinary situation, in fact, we doubt if there is one in the books even closely akin to it. It would be difficult for any court to determine whether each bit of evidence introduced in such a complicated situation was proper. Our consideration of the points argued by the government leads us to the conclusion that the rulings of the trial Court on the admissibility of evidence were as accurate as could reasonably be expected under the circumstances. In any event, it is

our view that no prejudicial error was committed on this phase of the case.

Lastly, we come to the issue as to the authority or power of the trial Court to increase the verdict of the jury by way of additur. As already noted, the jury fixed the amount of just compensation at the sum of $25,000. The Court allowed additur in the amount of $50,000, and entered judgment for $75,000, together with interest from the date of taking. The government contends that the Court erred in allowing additur and in the allowance of interest on the increased amount of the judgment. As heretofore noted, additur was allowed in response to defendant's motion which prayed "that the Court substantially increase the jury's verdict by an additur and enter an amended judgment for the amount of such increased award consistent with the overwhelming evidence in this case, or in the alternative, grant the defendant a new trial." The additur was allowed without the consent of and over objection by the government.

As a basis for its action, the Court entered certain findings of fact, including the following:

> 1. The government adduced no evidence whatsoever regarding the value of the premises in question on the basis of the leasehold except on the theory that there was a cancellation of the lease which is contrary to the law and the facts.
>
> 2. The fair and just compensation for the premises in question is Seventy-five Thousand Dollars ($75,000.00).

While perhaps not relevant to the question for decision, we think it should be noted that finding 1 is not supported by the record. The testimony of government's witnesses on the issue of just compensation was not based on the theory that the lease had been cancelled but that its right to revoke was not limited to

Naval aviation purposes, in other words, consistent with the government's interpretation of the lease, that it had a right to revoke for purposes other than those of aviation.

We also note that defendant has filed a cross appeal "on the ground that said additur, in view of the evidence, is inadequate and should have been for an amount not less than $117,000.00 and should have resulted in a total judgment of not less than $142,000.00, together with interest from the date of taking of the property being condemned."

The government in support of its position relies upon *Dimick* v. *Schiedt*, 293 U. S. 474, in which it was held that additur violated the right to a jury trial guaranteed by the Seventh Amendment to the Constitution. That case involved an action for personal injury in which the jury returned a verdict in favor of plaintiff in the amount of $500. Plaintiff moved for a new trial, principally on the basis that the damages allowed were inadequate. The trial Court ordered a new trial unless defendant would consent to an increase of the damages to the sum of $1,500. Defendant consented to the increase, but without consent on the part of plaintiff the Court denied the latter's motion for a new trial and entered judgment for the increased amount. The Supreme Court held that the conditional order of the trial Court violated the Seventh Amendment of the Federal Constitution in respect of the right of trial by jury.

Defendant contends that the *Dimick* case is without application because there is no constitutional right to a jury trial in a condemnation proceeding. Such a distinction was drawn in *United States* v. *Kennesaw Mountain Battlefield Ass'n.*, 99 F. 2d 830. In this opinion of the Fifth Circuit, the allowance of additur in a condemnation proceeding was approved. This

being the only case of which we are aware which affords any support to the action of the Court in the instant matter, we think it deserves some detailed consideration. There, the Court increased the jury verdict of $9,000 to $16,000, by additur. Defendant filed a motion for a new trial and the Court directed that it be allowed unless the government filed its written consent to increase the compensation to $16,000. The government's written consent was given and the motion for a new trial denied. Both sides appealed. The Court of Appeals held, that the government could not complain of the allowance of additur because it had consented thereto. The condemnee, relying upon the *Dimick* case, contended that it had been denied the right to a trial by jury. The Court held that the parties in condemnation had no constitutional right to a jury trial, as was the situation in the *Dimick* case. The Court then stated (page 834):

> But if we are wrong in this, and the proceeding was a common law action with a jury trial guaranteed under the Seventh Amendment, still the judgment should be affirmed, because it conclusively appears from the record itself, and from the findings of the District Judge, that the trial was not attended with any error for which a new trial at common law ought to have been granted.

Thus, in *Kennesaw,* the condemnor, the party burdened by the allowance of additur, expressly consented thereto, while the condemnee opposed its allowance and urged its motion for a new trial.

In the instant case, the condemnor, the party burdened by the allowance of additur, objected thereto, while plaintiff requested a new trial only as an alternative to its motion for the allowance of additur. The facts of the two cases are similar in one respect, that

is, in both, the condemnee had no basis for a new trial other than that the amount of just compensation filed by a jury was inadequate. The Court of Appeals, in *Kennesaw* (page 833), agreed with the District Court that "the condemnor could not complain of the additur, because it had consented to it, the owner could not complain of it, because, there being no ground for a new trial, the addition to the verdict was in his favor."

We doubt if the Court in *Kennesaw,* absent consent on the part of the condemnor, would have approved additur. In both *Dimick* and *Kennesaw,* the complaining party was the one in whose favor additur had been allowed. In both cases the complaining parties refused to agree to additur but demanded a new trial. In *Dimick,* the Supreme Court ruled additur improper on the basis that the non-consenting party had a constitutional right to a jury trial. In *Kennesaw,* the Court held (1) that the non-consenting party had no constitutional right to a jury trial, and (2) that there was no error in the trial for which a new trial should have been granted.

We need not take issue with the holding in *Kennesaw* to reach the conclusion that it is without application in the instant situation. Here, additur was allowed at the request of defendant and over objection of the government. The theory of additur is a corollary to that of remittitur, the former to increase an inadequate verdict, the latter to decrease an excessive verdict. It is a universal rule, so far as we are aware—in fact, the parties in the instant action so agree—that a remittitur may not be granted by a court in lieu of a new trial unless consented to by the party "unfavorably affected thereby." Even though made in a different setting, we think a statement by the

Court in *Dimick* is pertinent. The Court stated (293 U. S. 474, 487):

> It is worthy of note that while for more than a century the federal courts have followed the approved practice of conditioning the allowance of a new trial on the consent of plaintiff to remit excessive damages, no federal court, so far as we can discover, has ever undertaken similarly to increase the damages, although there are numerous cases where motions for new trial have been made and granted on the ground that the verdict was inadequate.

We agree that parties to a condemnation suit have no constitutional guarantee of a jury trial but, even so, it does not follow that the Court, absent consent of the parties, has the authority to increase a jury verdict by additur or decrease it by remittitur. Rule 71 (A) (h) of the Federal Rules of Civil Procedure provides:

> * * * any party may have a trial by jury of the issue of just compensation by filing a demand therefor * * * unless the court in its discretion orders that because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

A jury trial was ordered in the instant case, the main and perhaps sole purpose of which was, as heretofore shown, to determine just compensation for the leasehold interest sought to be taken. The trial was conducted, so we think and hold, free from prejudicial error. We are not able to embrace any logical or reasonable theory by which the Court was authorized to substitute its judgment on the issue of just compensation for that of the jury, absent consent of the

parties. If Congress had intended that just compensation be determined by the Court, it could have easily so provided. If the Court has such authority, the right to a jury trial when awarded is little more than an empty gesture. The jury is stripped of the fact-finding characteristics inherent in the traditional jury trial and its function becomes nothing more than advisory.

It is our judgment, and we so hold, that the trial Court, under the circumstances, was without authority to increase the jury verdict by additur. It necessarily follows that there is no merit in defendant's cross-appeal. The judgment is reversed and the cause remanded, with directions that judgment be entered on the jury verdict in favor of defendant, together with interest thereon from the date of taking. This direction is without prejudice to the right of the Court to allow defendant's alternative motion for a new trial.

FINNEGAN, *Circuit Judge*: Dissenting. Since it is my view that this lease had been revoked, I am unable to agree with the majority opinion.

JUDGMENT

In the United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

Tuesday, July 15, 1958

Before Hon. J. EARL MAJOR, *Circuit Judge;* Hon. PHILIP J. FINNEGAN, *Circuit Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

Nos. 12191, 12192

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, APPELLEE

vs.

93.970 ACRES OF LAND, MORE OF LESS, SITUATE IN COOK COUNTY, STATE OF ILLINOIS, & ILLINOIS AIRCRAFT SERVICES & SALES CO., INC., DEFENDANTS-APPFLLEES, APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, AND THAT THIS CAUSE BE, AND IT IS HEREBY, REMANDED TO THE SAID DISTRICT COURT IN ACCORDANCE WITH THE OPINION OF THIS COURT

FILED THIS DAY, WITH DIRECTIONS THAT JUDGMENT BE ENTERED ON THE JURY VERDICT IN FAVOR OF DEFENDANT, TOGETHER WITH INTEREST THEREON FROM THE DATE OF TAKING. THAT DIRECTION IS WITHOUT PREJUDICE TO THE RIGHT OF THE COURT TO ALLOW DEFENDANT'S ALTERNATIVE MOTION FOR A NEW TRIAL.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 573

UNITED STATES OF AMERICA,

Petitioner,

v.

93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION.

QUESTIONS PRESENTED.

With respect to the first question which the Government has presented (concerning election of remedies), it will hereinafter be demonstrated that the question is not actually in the case. This question was decided by the Court of Appeals by way of *dictum* since the Court proceeded to construe the lease and determine the rights of the parties under the lease in connection with the valuation issues.

With respect to the second question presented by Government, many important elements have been omitted; for example, a reference to the recital in the preamble of the lease which reads:

"because of its strategic value, it is considered essential that the said airfield and the facilities thereon * * * be retained in a stand-by status for post-war use in connection with Naval Aviation activities, * * *";

other provisions in the lease; actions of the parties construing the lease, including expenditure of $60,000 for permanent improvements by lessee with approval of lessor.

REASONS FOR DENYING THE WRIT.

1. Election of Remedies.

a. In the trial court and in the Court of Appeals respondent urged that by instituting condemnation proceedings the Government was estopped by the doctrine of election of remedies from asserting: (1) that it had revoked the respondent's lease; and (2) that by reason thereof respondent had no interest in the property. This position was sustained by the courts below. However, the trial court and the Court of Appeals found it necessary to construe the lease for the purpose of determining the value of the lease and the amount of just compensation to be awarded.

These courts believed that the issue of the right of Government to revoke the lease was unavoidable on the question of just compensation because revocability was one of the elements of value. Accordingly, they applied the doctrine of election of remedies, which should have barred any inquiry into the issue of whether or not the Government had the right to revoke, in a manner which made the doctrine actually unnecessary and meaningless because the issue of revocability immediately cropped up

in connection with valuation. Even though the Court of Appeals below had in mind the valuation issue when it construed the lease, the end result was a determination that Government could not revoke the lease for the purpose stated in the notice of revocation, and this determination was made on the basis of contract law and not on the basis of the doctrine of election of remedies. The Court thus did entertain the issue of revocation of the lease raised by Government and actually adjudicated it. The Government has had a full hearing and determination of the issue of revocation which it now claims it has been precluded from raising. It is respectfully suggested that this Court should not grant certiorari to review the election of remedies issue which was actually decided only academically by the court below without any effect on its ultimate decision.

As to the merits of invoking the doctrine of election of remedies, its application to condemnation cases is sound. With respect to the inconvenience that the Government claims will flow from the application of the doctrine of election of remedies, the Government is resorting to the familiar cry of expediency which has throughout the history of Government been seized upon in an effort to whittle away personal and property rights. Government claims that it would be inconvenient to seek to obtain through a possessory action possession of property which it claims by right of ownership. It prefers to seize possession first by exercising its sovereign powers of eminent domain and then at its leisure, litigate the question of whether it is entitled to possession by virtue of ownership. Possessory actions are summary in nature and it must be presumed that the trial courts would always be responsive

to the urgencies of the situation and would grant the Government a speedy trial if the Government would bring any possessory action to test its rights to the property. There is no genuine necessity for obliterating the property right to remain in possession until there has been an adjudication that an adversary claimant is entitled to that possession.

b. The effort of the Government to criticize the situation as a matter of form and technical pleading discloses a complete misunderstanding of the situation. There are fundamental rights involved. When a contest over the right of possession is instituted, the person in possession cannot be ousted from possession until the rights of the parties have been adjudicated. Even the Government in a possessory action would not have the right to be put in possession until it has established that right after trial. The Government's position as claimed owner with right of possession is far different from the Government exercising the power of eminent domain. The exercise of the latter power entitles it to immediate possession leaving only the question of amount of compensation it is to pay for the property taken. It is not merely a difference in form when the Government files an action claiming to exercise the power of eminent domain as contrasted with a pleading asserting ownership and right of possession. As the Court of Appeals below said: "In the same breath, the Government proclaimed and denied defendant's ownership of the leasehold estate. Such an absurd position is not countenanced by law, as we understand it, and neither is it supported by logic, reason or common sense." It is highly inequitable to permit the Government to reap the benefits (immediate possession) of the exercise of eminent domain and then abandon its sovereign cloak and pursue the course of an ordinary litigant claiming property as a matter of right.

The exercise of the sovereign power of eminent domain is at best harsh in its consequences because it takes property from the owner without his consent. One of the harshest incidents of the situation is virtually instantaneous surrender of possession. The harshness of the situation should not be aggravated by distorting the power of eminent domain to permit the Government to seize possession immediately in connection with the non-sovereign claim of ownership and possession.

c. The Government's assertion that the decision below is in square conflict with the decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Turner*, 175 F. 2d 644, is based upon a misapprehension of the law applicable to election of remedies. The court below was bound under Federal statutes to apply the law of the State of Illinois. By virtue of Federal statutes (50 U.S.C. 171; 10 U.S.C. 2663), local law is applicable to Federal condemnation cases. The laws of the forty-nine states might differ and the various Courts of Appeal might reach varying conclusions on the question of election of remedies. This would not necessarily create a conflict in the decisions. The various Courts of Appeal would simply be applying the law of the particular state in which the condemned property is located. While it is not clear from *United States* v. *Turner* which law was being applied, it is obvious that it could not have been the law of Illinois, since the land being condemned was situated in Alabama.

d. The complaint in the instant case relies for the taking upon 50 U.S.C. 171, among other statutes. This Act provided that proceedings thereunder should be "in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted". 50 U.S.C. 171 was repealed and replaced on August 10, 1956 by the Armed Forces

Recodification Statute, 10 U.S.C. 2663, which provides that the condemnation proceedings "shall be in accordance with the law of the state in which the suit is brought".

The decision of the Court of Appeals below on the question of election of remedies is supported by settled Illinois law, which is the only law applicable. Therefore it is specious for the Government to argue that a conflict of decisions results from holdings of courts necessarily decided on the basis of the law of other states or Puerto Rico.

If this state of lack of uniformity in result, because of differences in local law, inflicts a hardship upon Government in its condemnation activities, which is not persuasively demonstrated, the remedy, we respectfully submit, is not in a review of this decision by this Court but in an appeal to Congress to amend the Federal law on the subject. The Government has not shown any conflict of decisions on the election of remedies issue which warrants granting certiorari on this question.

2. Construction of the Lease and the Leasing Statute.

The legal issues in the case at bar pertaining to the construction of the lease and of the statute under which it was executed are not of general importance. In fact, it is safe to say that the decision in this case should be of interest to practically no one except the parties in view of the unique language of the lease, the unique nature of the demised premises and the uses made thereof during the term of the lease, and the combination of unusual circumstances involving the parties' own construction of the lease by their conduct during respondent's seven and one-half years of possession of the premises. The possibility of a similar factual situation ever again arising

whether based on existing or future government leases, passes all credulity.

The Court of Appeals below, in commenting upon the evidence, stated:

> "Certainly the Court was presented with an extraordinary situation; *in fact, we doubt if there is one in the books even closely akin to it.* It would be difficult for any court to determine whether each bit of evidence introduced in such a complicated situation was proper." (Emphasis added.)

While the case at bar lacks national importance because of its uniqueness, the complicated evidence necessarily involved in proving the fair market value of the condemned leasehold apparently has confused the Government into believing that the case presents novel legal issues pertaining to leases and statutory construction. Actually, the legal issues involve only elementary and simple principles of contract and statutory construction which have been overwhelmingly adjudicated in favor of respondent's position by numerous precedents.

The confusion on this score on the part of the Government is demonstrated by its statement of question 2 appearing on page 2 of its Petition for a Writ of Certiorari; namely,

> "Whether a lease of a Navy airfield which provided that it could be revoked upon a determination that 'such revocation is essential' and which was entered into under a statute requiring that such leases be revocable 'at any time', could be revoked upon a determination that the property was needed for an Army missile site."

By quoting out of context selected phrases of the lease and the statute, the Government has evolved a question

of law which on its face is self-answering but which in reality has no resemblance to the true issues involved. Actually, the lease was not revocable upon a determination that such revocation is essential. Nor does the statute require that such leases be unconditionally revocable at any time.

It is an elementary principle of law that a lease, as any contract, must be construed as a whole and the intention of the parties collected from the entire instrument and not from detached portions, it being necessary to construe all its parts in order to determine the meaning of any particular part as well as the whole. Likewise, it is a fundamental principle of construction that the conduct of the parties, especially during performance of the contract, indicating their construction of the lease, must be considered.

It is perfectly apparent from its opinion that the Court of Appeals reached its conclusion that the lease could be cancelled only for aviation purposes, contrary to the Government's contention that it could be cancelled for any reason whatsoever, by following the foregoing elementary principles of construction.

This involved an exhaustive review of the terms of the lease and the complicated evidence to reach a conclusion regarding the intention of the parties with regard to the meaning of the cancellation clause. But no novel legal issues were involved in this process; nor are any now involved.

Likewise, as the Court of Appeals below points out, "There is no question but that the lease conferred upon the government the power of revocation. The controversy concerns the manner, purpose and by whom such power may be exercised." And subsequently in its opinion the

Court also states, "It passes all credulity that Congress would require that a lease be revocable at any time irrespective of the conditions existing or the reasons assigned therefor. More importantly, the record shows that the lease was prepared by the Secretary of the Navy or his subordinates, and we think it safe to assume that they were aware of their rights under the law and acted accordingly."

Because the lease could be revoked at any time during a National Emergency it fully complied with the statute, and merely because it could be revoked only for the reasons stated in the lease no novel question of law is involved. This is true of every lease.

We shall not burden the Court with extended argument on the question of the construction of the lease because the decision below fully explains the basis upon which the court reached its conclusion; that the absolute power of revocability by Government does not exist. The lease in the case at bar is unlike the lease in the case referred to in the footnote on Page 25 of the Government's Petition (*Hingham Management Corp.* v. *United States*). In that case the lease provided that it could be terminated "at any time * * * during any national emergency." The lease in the case at bar in its revocation clause is not similarly absolute and all-embracive. It provides not only for the existence of a national emergency but injects the additional reqpirement of "a decision by the Secretary of the Navy that such revocation is essential". The element of essentiality is subject to different constructions and accordingly, it becomes necessary, in order to ascertain what the parties meant by the word "essential," to resort to other provisions in the lease and the conduct of the parties construing the lease. For example, the record shows that the lessor authorized the lessee to

expend $60,000.00 of lessee's own money for permanen improvements, and that such improvements were actuall made to the demised premises. This is inconsistent wit the precarious tenancy which the government claims wa granted by the lease. It was consistent only with a rea sonable, calculated risk that termination could take plac only if the premises were again needed for Naval Avia tion purposes, an eventuality that never occurred; an which the evidence showed was extremely remote.

The preamble in the lease makes it clear that the in tention of the parties was to preserve the demised prem ises as a stand-by airfield "for post-war use in connectio with Naval Aviation activities", and that the parties in tended that the lease could be revoked only if the Secre tary of the Navy considered that the demised premise were essential for Naval Aviation activities.

With respect to the supposed repugnance between th revocability clause as interpreted by the court below an the applicable Federal statutes, it should be remembere that this lease was drawn by Government attorneys an signed by Government officials. It is to be presumed tha they were correctly interpreting their powers under th Federal statutes. The language of the revocation claus did not stop at expressing absolute power to revoke. attached an important qualification.

It is not unreasonable to construe the statute as pe mitting revocation only in the limited circumstances de fined by the revocation clause in the lease. The object o the statute was to insure that the leasing authority coul recapture the property *for the use to which it was bein preserved in a stand-by condition.* This is an intelligen interpretation of the statute. With respect to the demise premises in the case at bar, the intention of the statut

and the intention of the parties are both effectuated because the Secretary of the Navy reserved the right under the lease to repossess himself of the property whenever it was needed *for Naval Aviation activities.* If a broader power of revocation was desired, it would have been easy to insert a provision to that effect. The Government attempts to argue the point as though the revocation clause contained such an omitted provision.

CONCLUSION.

For the foregoing reasons, the Government's petition for writ of certiorari should be denied.

Respectfully submitted,

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